DOCUMENT RESUME

ED 244 322 EA 016 749

AUTHOR Bednar, William C., Jr.
TITLE Preventive School Law.
PUB DATE 84
NOTE 15p.; In: Jones, Thomas N., Ed. and Semler, Darel P., Ed. School Law Update...Preventive School Law. p1-14. For complete document, see EA 016 748.
PUB TYPE Viewpoints (120)

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS *Compliance (Legal); Court Litigation; Elementary Secondary Education; Interprofessional Relationship; *Lawyers; *Legal Problems; *Legal Responsibility; Politics of Education; School Administration; *School Law

ABSTRACT

The purpose of this chapter is to suggest outlines of a preventive law practice, raise issues, and provoke further thought and discussion concerning the application of preventive law principles and techniques to the management and operation of educational systems. The theory of preventive law and some of its premises are examined in order to assess the implications that preventive law may have for the anticipation and resolution of legal problems commonly encountered in schools and school systems. The roles performed by attorneys, administrators, school law professors, and other professionals are considered, with particular attention to the attorney-client relationship. Advantages cited for preventive legal planning include control of costs, discouragement of litigation, and better assurance of a good defense if a lawsuit is filed. Through foresight educators can predict legal risks and minimize their scope, or at least evaluate the risks and choose courses of action less risky than others. The cost of prevention can be predetermined; the cost of redress cannot. (TE)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

X This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY

T. N. Jones

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

ED244322

1

EA 016 749

Preventive School Law

WILLIAM C. BEDNAR, JR.

William C. Bednar, Jr. is a partner in the practice of law with Eskew, Muir & Bednar, Austin, Texas. He received his law degree from the University of Texas School of Law and was editor of *Texas International Law Journal* for ten years where he received the Editor's Scholarship Award. Mr. Bednar was Assistant Attorney General for Texas in the education and civil rights section as well as practicing in the field of school law. He has researched, written and spoken on many subjects about school law, thus lending his practical as well as intellectual expertise to this field. Mr. Bednar is now on the Board of Directors of NOLPE.

At the outset one might ask why school people should be concerned with preventive law? After all, if there is nothing to prevent the true sorehead from finding a lawyer, paying the filing fee, and forcing one to his defenses in court, why pay good money to your own lawyer until the summons arrives? Lawyers insist on charging high hourly fees. Why not wait until the last possible hour to turn on their meters?

There are some obvious answers and some less obvious answers to those who would advance such arguments. Consider first the question of cost. It is a fairly obvious proposition that in most situations it costs less to avoid trouble than it does to get out of trouble. As a matter of direct cost, which is that of simply setting things right, it is plainly less expensive, for example, to pay for a survey and abstract of title than it is to move or alter a million-dollar school building built three feet over a property line. In addition to direct costs, there are less obvious indirect costs. Correcting errors nearly always consumes time, disrupts plans, and frays tempers. All too often, it also destroys valuable relationships and diminishes the quality of education. These are factors which are less capable of precise calculation, but whose detrimental impact on the schools may be far greater than the direct costs. How many of us who have dealt with some aspect of school desegregation would have rather done the same thing our way, rather than the plantiff's way, the government's way, or the federal judge's way? How much did it cost to do it their way?

Now, this is not to say that prevention of legal trouble is not without its own costs. But the difference between the cost of prevention and the cost of cure is that, in most situations and with reasonable accuracy, the cost of preventing legal problems can be predetermined whereas

the cost of cure cannot. A school district can plan how and when it will engage in a program or activity, for example, a girl's athletic program, and roughly what it will cost for materials, human resources, and legal advice. But suppose the legal advice is foregone, and some foreseeable ingredient deterimental to the lawfullness of the program turns up, such as an element of sex discrimination in violation of Title IX? Without preventive legal advice, one may not even realize that the problem exists. But even with a grasp of the problem, one cannot easily predict the form in which it will be presented or when it will arise. Will it be when the United States Office of Civil Rights arrives for a routine compliance review? When a student files a private suit? When the school district requests and is denied federal funding? Will any of these things occur soon? A year from now? Two or three years?

Control of costs is not the only advantage of preventive legal planning. Being named a defendant in a lawsuit is always one of the risks we run in our litigious society, and education institutions, as all of us here know, are particularly susceptible to lawsuits. But even in the face of litigation, preventive legal planning tends to decrease the likelihood of a lawsuit actually being filed, rather than merely threatened, and gives better assurance of a good defense if a lawsuit is filed.

The importance of discouraging litigation has been obvious to school law veterans for years, and cannot be overemphasized here in 1983, a year, for example, in which the Fifth Circuit Court of Appeals has held that attorneys' fees *are* available to a prevailing plaintiff in a suit to enforce P.L. 94-142 if that plaintiff has taken pains to state a federal constitutional claim as well as a statutory claim under the act, and has intimated that attorneys' fees for state administrative proceedings may also be awarded.[1] And if a suit is perchance filed for punitive damages under section 1983, one will yearn for a carefully anticipated and prepared defense in view of *Smith v. Wade*,[2] decided last April, in which the Supreme Court of the United States did away with actual malice as an indispensable element of proof and held that a jury may assess punitive damages solely upon a showing a reckless or callous indifference to the federally protected rights of others. That alone is reason enough not to be reckless or callously indifferent to those who possess the ability to haul us into the courthouse. To the contrary, to the extent that human behavior and the law are themselves reasonably predictably, we can through foresight predict legal risks and minimize their scope, and, even in those areas where the law is less certain, as is

1. Espino v. Basteiro, 708 F.2d 1002 (5th Cir. 1983).
2. 103 S. Ct. 1625 (1983).

perhaps more frequently the case in a school practice, we can at least evaluate the risks and choose courses of action that are less risky than others.

That brings us to the purpose of this chapter, which is to suggest the outlines of a preventive school law practice, raise issues, and provoke further thought and discussion concerning the application of preventive law principles and techniques to the management and operation of educational systems. The theory of preventive law and some of its premises will be examined, in order to arrive at a working idea of the term "preventive law," as well as the implications preventive law may have for the anticipation and resolution of legal problems commonly encountered in schools and school systems. The somewhat different roles to be performed by attorneys, administrators, school law professors, and other professionals will also be considered, with particular attention to the attorney-client relationship, which lies at the heart of any program of preventive law.

It is the purpose throughout, however, to raise more questions than answers, and thereby to encourage and stimulate not only individual preventive law strategies but also a role for NOLPE in fostering and improving preventive law among its membership and providing preventive law resources to other interested groups and persons.

There is not extensive literature on the subject of preventive law. The *Index to Legal Periodicals* does not even include preventive law as a subject heading. Neither does the card catalog of the University of Texas Law Library. Consequently, for some of the ideas already expressed and for much of what is to come in the way of theory and techniques, the author is greatly indebted to Louis M. Brown, Professor of Law emeritus at the University of Southern California, and Edward A. Dauer, Associate Dean and Associate Professor of Law at Yale Law School, who have co-authored an article recently appearing in three parts in the *Preventive Law Reporter*.[3] Professor Brown is a major proponent of preventive law as a coherent discipline, and in 1950 he authored a very useful treatise which has also been a rich source of ideas for this chapter.[4]

There are several helpful distinctions to be drawn between preventive law and the more curative approach usually taken by lawyers and clients faced with resolving a dispute or a problem that has already occurred. Indeed it is the chronological element that provides the most

---

3. L. Brown & E. Dauer, *A Synopsis of the Theory and Practice of Preventive Law* (in three parts), 1 PREVENTIVE LAW REP. No. 1 at 6-9 (July 1982), No. 2 at 5-8 (Oct. 1982), No. 3 at 6-13 (Jan. 1983) [hereinafter cited as Brown & Dauer.]

4. L. BROWN, MANUAL OF PREVENTIVE LAW (Prentice-Hall 1950), reprinted as PREVENTIVE LAW (Greenwood-Press 1970).

universally distinguishing characteristic between a preventive law problem and a curative law problem. As Brown and Dauer put it:

> Dispute-centered representation—advocacy—focuses largely if not exclusively on things that have already happened. Preventive lawyering is concerned largely if not exclusively with things that might happen in the future. From the client's point of view advocacy is necessary to correct an undesired problem that has already occurred; planning is useful to structure the future in some desired and optional way.[5]

Another distinction is in the allocation of decisionmaking between lawyer and client. In litigation, the client is generally regarded as the one who determines the goals to be achieved and allocates the responsibility between lawyer and client in pursuing them, while the lawyer decides upon the means of achieving the goals set forth by the client. But in the preventive practice, objectives and means may be indistinguishable, and the decisionmaking aspects of the lawyer-client relationship more complex.

By way of illustration, consider the public school teacher who wants to do something about the fact that he has been fired for incompetence. This is a curative situation in which most of the operative facts have already occurred. The teacher has or has not taught competently. His performance evaluations and other performance-related memoranda are, or are not, already in the files and they are, or are not, accurate. The decision to terminate has already been made, and the administration's witnesses are waiting in the wings. The client has suffered an undesirable result, being fired, and he now wants either to be compensated in damages for the harm done to him, or to have the injury redressed through an injunction reinstating him.

Now, there may be many complex motivations behind this client's decision to go to a lawyer rather than walking away from the problem, but ordinarily the lawyer will take the stated objectives—to win damages or an injunction—at face value, just as the school's lawyer will usually take at face value the administration's stated objective of avoiding damages or an injunction.

But in the preventive practice, the client's objectives more often should be seen as means for achieving more basic underlying purposes, and less often should be taken at face value by the lawyer. Suppose another teacher comes to her lawyer, but this time right after the receipt of her first adverse performance memorandum, and states that she wants an injunction expunging the memorandum from her file. As

5. Brown & Dauer, *supra* n.3, Part 1 at 7.

a legal matter, such an injunction may or may not be difficult to obtain, but the preventive law question is whether such an injunction is really the client's purpose. When the teacher asks "How do I get an injunction to get that memo out of my file," the question can be seen not as a question but as a solution to an underlying purpose, which may be to repair a relationship with the principal, or perhaps to avoid being dismissed. But even these formulations of the objective may be seen as only one of several solutions to yet another purpose even more deeply seated—to be a competent and well-regarded teacher rather than an incompetent and ill-regarded one. Does the teacher have a good or a bad working relationship with the principal who papered her file? Does the teacher want to continue working in this school or school system, or not? Will a transfer and a fresh start achieve the same purpose with less adverse side effects? If not, what measures can the teacher take to correct deficiencies and improve her performance evaluation? Would that be cheaper and better than a lawsuit?

Much the same analysis, of course, can be applied in the opposite situation, where the superintendent comes into the lawyer's office and announces that he wants to initiate dismissal proceedings to fire a teacher. His purpose may really be simply to get rid of the teacher, for which a dismissal proceeding would be but one possible solution. What about a transfer or resignation? Or perhaps what he really wants is the same thing that our teacher in the previous example wanted—competent performance on the job—which would call for still a different approach.

The point is, that in the preventive practice the lawyer is called upon to be sensitive to the total personal or institutional context in which the client is raising the problem and to the basic motivations that may be involved. In litigation, a judgment is entered for or against the client, which is an objective outcome that usually ends the matter. But preventive legal counseling results in an arrangement that projects into the future, where the clients may be well-served or ill-served depending on the depth and thoroughness of the lawyer and the client in focusing on the decisions to be made.

Moreover, in the preventive practice lawyer and client are usually faced with an admixture of legal and extralegal judgments. Whether a given set of facts, presented in a particular type of lawsuit, will yield a win or a loss at the courthouse is a matter of legal prediction, which lies principally in the domain of the lawyer's judgment. But whether the particular transaction or relationship being fashioned by policy, contract, and conduct in the operation of a school will satisfy the many institutional and personal objectives to be obtained requires not only predictions of law, but also predictions of fact, which need to be clearly

identified as such and explicitly allocated between lawyer and client during the process of consultation.

Yet another distinction between litigation and the preventive practice is the extent and variety of choices, which are far broader in the preventive realm. In the courthouse, most of the procedural rules are established and controlled by a third party—the court. In preventive law, there is no court and the only rules are those of the lawyer's best judgment in light of the client's purpose, which we have seen can be highly variable depending on the depth of the analysis. Once an event has happened, the law applicable to it is more or less certain. But the preventive practice focuses on planning, which is in a sense creating facts that will exist in the future. If we are not satisfied with the legal result that would flow from one set of facts, we may be free within surprisingly broad limits to draft our board policies, our school rules, our administrative directives, and our contracts, or to make antecedent decisions regarding student discipline, library books, religious holidays, and the other myriad things entailed in running a school system, in such a way as to yield an entirely different set of facts when a point of legal dispute is eventually reached.

Finally, in this overview of the theory of preventive law, there are those decisions calling for legal judgment that have irreversible consequences for the client. These occur in litigation, as where a co-defendant is or is not to be joined or a cause of action pleaded or not pleaded within the required time, but once framed and presented at trial, the disputed issues are decided by a judge or jury, from whose decision there are avenues for appellate review. But in the realm of planning, the law of the client's future is more often decided by the lawyer alone and, once the client is committed to a course of action through enactment of a policy or execution of a contract, the decisions may be irrevocable. Policies can be changed, but this will be to no avail if third parties have acted pursuant or contrary to them. Contracts can be amended, but not unilaterally. A collective bargaining contract lives on forever.

Given the importance of the legal planning process, what are its techniques? From the lawyer's point of view, the first will be to perform, with one important difference, essentially the same task of legal analysis as would be performed in a curative situation, which is to discover what substantive legal rules bear on the client's purpose, *i.e.*, what facts will, under the law, yield what results? The important difference is that the facts have not yet happened, and the task is to create, in the present, those facts in the future that will produce legal results consistent with the outcome desired by the client. The lawyer accomplishes this by creating institutional and transactional structures,

drafting documents, and influencing client behavior, according to a plan devised in cooperation with the client and measured and revised against the client's capabilities and other interests. The entire matter is thought through from beginning to end, considering what events might possibly affect the ultimate purpose, and the plan is accommodated to these possibilities so as to leave the purpose unimpaired. Consideration is also given to future stages of the client's own conduct once the immediate purpose is accomplished, and provision is made, to the extent possible or foreseeable, for the contingencies that may be presented. Then the plan is reviewed for effectiveness as it unfolds, either when predetermined decision points arrive or when unforeseen events occur.

Finally, preventive law includes the separate technique of the "legal checkup" or "legal audit." The client should not necessarily be charged with all of the responsibility for recognizing specific problems or purposes that call for the sort of preventive analysis we have been describing. To quote a medical analogy from professors Brown and Dauer:

> [M]ost people can recognize a broken arm. Few can monitor their serum triglycerides and many don't even know that they should. It is therefore the profession's obligation to suggest, to make available, and to analyze the lab work on some periodic basis. A *checkup* is a regular part of preventive professional care; the utility of professional service is not limited to treating the client who arrives, fortuitiously, with a broken arm.[6]

With regard to both individuals and organizations, the concept of preventive law includes as an important element the checkup or legal audit, in which the client's legal facts are ascertained and analyzed for legal problems, and appropriate legal measures are applied.

Even though the main thrust of preventive law is to avoid litigation, there are also preventive techniques that can be utilized once a lawsuit is filed both to control litigation costs and to achieve desired results. The overall objective in each case is to determine the best economics in dollars and time to achieve the desired result, which again calls for frank and friendly cooperation and communication between lawyer and client and a thorough and candid analysis of the client's purposes. What overall value in dollars, if any, can be placed on the case? Can a litigation budget be worked out? Can lawyer and client agree in advance on the amount and type of discovery to be conducted? Are there technological resources in the client's office that can benefit the lawyer's preparation for trial and vice-versa? What about investigation of facts and gathering of documentary evidence, and the preparation

---

6. *Id.*, Part 3 at 5.

of witnesses? If the litigation has major systemwide implications, as in the case of a desegregation suit, should some form of lawyer-client task organization be fashioned to provide stability, consistency, and continuity of effort? A lawsuit may begin under one set of assumptions and purposes, but be subject to entirely different ones by the time it reaches final judgment several years later, owing to the different composition of its board of trustees or administration. What protocols between lawyer and client would provide a history of their communications as a point of reference for evaluating and accommodating shifts in the client's attitude toward the case? All of these questions suggest that a preventive law approach need not be abandoned upon the filing of a lawsuit, but may instead be profitably employed to curb costs, prepare effectively for trial, and maintain a consistent overall perspective on litigated cases.[7]

Given the manifold advantages of legal planning, we might well ask why there has not been a more comprehensive and disciplined approach to preventive law in the field of school law. This does not mean to imply that preventive law has not been one of NOLPE's concerns up to now, nor that preventive law is not being practiced within the NOLPE membership. Indeed, all of the NOLPE publications are preventive devices in the sense that they help identify the legal rules that govern the planning process, and many of them are overtly preventive in approach.[8] And surely there are those of our membership who regularly and purposefully practice preventive law. Still, preventive law has not reached the level of sophistication in the school law practice that it has in areas of the law that have lended themselves more readily to transactional planning, such as business and commercial law, wills and estates, property and trusts, and state and federal taxation.

Until recently, this might have been explained on the basis that the school practice is a relatively new area of the law, in which settled legal rules have not yet emerged. Rules of law are employed in the planning process in order to know, with a given purpose in mind, what facts must be created in the future to yield legal results necessary to or consistent with that purpose. This process is less precise, and therefore less fruitful, where the legal rules themselves are unsettled. But then we must ask, in how many areas of the school practice are the rules really unsettled anymore? Certainly not in the matter of due process for

---

7. See generally, M. Haring, *Perspectives on Litigation Cost Control*, 55 N.Y. St. B.J. 6 (May 1983).

8. *E.g.*, K. Frels & T. Cooper, A Documentation System for Teacher Improvement or Termination (NOLPE Mino-Monograph 1982); R. Phay, Reducation in Force: Legal Issues and Recommended Policy (NOLPE Monograph 1980).

teachers and students. The rules there have been clear for years. And what of the many transactions in which a school system or educational institution stands in essentially the same shoes as any other business client, as in the purchase or sale of real property, or the defense of a vehicle accident claim? It would appear that preventive law concepts would have great and immediate utility in many areas of the school practice if only we would pause, think, and utilize them.

The thought of pausing and thinking, however, suggests another reason why preventive law has not received more emphasis in school settings. Most schools and school systems, at all levels, are public agencies whose limited fiscal and legal resources have tended by design or by default to be absorbed by crises, such as litigation, administrative hearings, federal compliance reviews, telephone calls from anxious administrators with on-site problems, and the press of routine school business having legal implications. But perhaps the time has come to pause and think through what advantages can be gained in allocating some portion of our resources specifically to a preventive law program.

Certainly we are in an age in which growing distrust of governmental authority generally is leading to increasing legalization of the relationships among administrators, teaching faculty, students, parents, and taxpayers. What has emerged is an emphasis on legal process as a means of achieving accountability for public decisions. In the schools, disputes that once might have been resolved informally on the basis of cooperation and mutual trust, are now subject to court-like procedures and rules designed to curb the discretion of school officials to make autonomous decisions. The educational community has not been unresponsive to these trends. School administrators, with an eye toward reinforcing their version of facts, have become more meticulous and circumspect in their own procedures and record keeping. Informal decisionmaking has tended to become decentralized as school administrators, with an eye toward escaping personal liability, consult more frequently with parents, teachers, lawyers, and governing boards in order to spread responsibility and "institutionalize" their decisions. Decisions are more often delegated to the parents or students themselves, in the form of signed authorizations for particular programs, activities, or administrative actions. Hearings are routinely offered and held. The language of court decisions more often appears in written communications and official records.[9] In an instinctive sort of way, many school prople and their lawyers are practicing a form of preventive law already.

---

9. *See*, M. Yudof, *Legalization of Dispute Resolution, Distrust of Authority, and Organizational Theory: Implementing Due Process for Students in the Public Schools*, Wis. L. Rev. 891 (1981).

But in our concern with whether a "case" is "winnable" and not whether the best interest of the school, student, or employee is served, perhaps the legalization of our schools has gone too far. As Grant Gilmore has said:

> Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.[10]

Or as Professor Yudof has asked, are we now excessively committed to "a formalism in which procedure is deified at the expense of education?"[11]

Preventive law, in which we predict not only what courts and other tribunals are likely to do, but also how *people* are likely to feel injured, and how they will behave, may afford us a means of extricating ourselves from these complexities. The possibilities exceed by far the scope of this chapter, but here are a few ideas to provide some starting points.

Certainly in those areas of the school practice where the educational entity is engaged in purely proprietary transactions the principles of preventive law can be immediately put to good use. For example, there is much to be concerned about in purchasing computer systems. Has the vendor's proposal been incorporated into the contract? How about the specifications? Can a portion of the purchase price be withheld pending installation and acceptance? Does the contract contain an objective test by which the acceptability of the system can be judged? Is there a "drop dead" date upon which the purchaser can walk away from the transaction if the vendor has not been able to make the system work? Who bears the risk of loss of the equipment and software prior to acceptance by the purchaser? What warranties are offered, and are they adequate? These, and other questions relating to maintenance, training and software support, software updates, remedies for vendor's failure to perform, assignability of the contract, and other things are all matters that have important operational consequences once the contract is in place, and they are matters which, in today's competitive computer market, are subject to negotiation with computer manufacturers, consultants, and retailers.[12] This is, of course, but one example of the many sorts

10. G. GILMORE, THE AGES OF AMERICAN LAW 111 (1977).
11. M. Yudof, *supra* n.9, at 919.
12. *See*, G. Kruger, *Representing the Purchaser of a Computer System: A Checklist of Major Contract Issues*, 1 PREVENTIVE LAW REP. No. 3 at 4 (Jan. 1983).

of transactions in which an educational institution is in much the same position as any other business client, and in which preventive legal planning can offer highly cost-effective benefits.

But educational institutions are, in the great majority of instances, also state or local governmental bodies, and much of their collective and individual conduct results from the implementation of policies and rules. Here, too, there are opportunities to save much trouble and grief through preventive legal planning. A preventive legal analysis directed at new educational programs or activities might first ask whether the proposed policy will cause injury. To whom? How? Will the injury, if any, be educational? Occupational? Psychological? Is there the prospect of bodily harm? Will there be disproportionate effects among protected minority groups? What procedures and lines of communication will yield good answers to these questions? Once information of this sort has been gathered, it can be evaluated from the legal standpoint and the policy issues thus raised debated and resolved. The line between policy options and legal requirements can be clarified, and points of legal vulnerability can be shored up through appropriate amendments.[13]

School policies, of course, have a profound impact upon practically every aspect of a school's educational functioning. They constitute the organic law of the institution, and touch upon practically every area in which legal challenge or litigation is likely. A strong preventive law approach to policymaking therefore does much to create the future factual framework in which legal disputes will arise and be resolved, whether the subject be employment relations, student discipline, racial discrimination, handicapped children, testing and evaluation, or even the levy and collection of school taxes.

Educational institutions are also composed of people who are or may be the clients of lawyers, and I would suggest as a major area for scrutiny the lawyer-client relationship itself. Nothing is more essential to the success of a preventive law program than candid, complete, and timely communication between lawyer and client.

For lawyers, this means re-examining some old assumptions. Every young lawyer learns, or thinks he or she learns, early in the practice of law that clients do not want to pay their hard earned money to a lawyer who tells them they are wrong or misguided. Everybody knows that clients pay lawyers not only to tell them they are right, but to prove they are right. This is a difficult feeling to dislodge, particularly when so many clients regularly reinforce it. But dislodge it we must

---

See, M. McClung, *Preventive Law and Public Education: A Proposal*, 10 J. L & EDUC. 37 (1981).

if we as lawyers are to serve those school administrators and other clients, more often the young, bright ones, who come to us not with lawsuits, hearings, and other crises, but with purposes, objectives, and plans. We will have to be more scholarly in our research, more careful and deliberate in our legal reasoning, more circumspect in our view of the client's operational setting and motivations, and more willing to venture into the realm of extralegal decisionmaking. Can we develop checklists and procedures for determining the legal health of our clients? Are "legal audits" practical and affordable? Can we make them that way? And let us certainly be mindful of the place of lawyers in the overall scheme of things. At a lecture in Austin recently, John Naisbitt, author of *Megatrends*, said "Lawyers are like beavers. They get right in the mainstream and dam it up.!" Some situations brought to us by a client will not be amendable to legal analysis, and on those occasions let us have the good grace to say so.

For clients, good communication may call for a reassessment of the way in which lawyers are viewed. There are at least two ways of looking at lawyers that will do much to wreck a preventive law program before it gets started.

The first is to think of the lawyer as a technician or consultant from whom an "opinion" is sought. Clients who take this approach frequently provide only the facts that seem important to them, and all too often the concern is simply to bolster with a lawyer's opinion a course of action already decided upon or a position already taken. For some clients, one lawyer isn't enough, and they will call four or five for a sampling of opinion on their problem. Unless the relationship is a continuing one with considerable contextual knowledge on the part of both lawyer and client, those "quickie" opinions over the telephone are worthy exactly the pittance usually paid for them. Another unfortunate consequence of viewing the lawyer as a technician is the tendency to bifurcate a problem into "the educational part" and "the legal part," as if the one can be accomplished independently of the other. This leads to poor communication about purposes and objectives and a limited view of alternatives.

The other view of lawyers that seems to prevail in some quarters of the educational community is that of the "miracle worker." For these clients the law is a delphic mystery, to be invoked with incantations and magic. All one needs is blind faith in one's chosen course of action. The lawyer will find a way to vindicate it. The tendency here, of course, is not to call the lawyer until it is time to waive the magic wand, but usually that is too late, and the benefits of preventive law planning are lost.

A good preventive law approach instead calls for involving the lawyer regularly in the operations of the school district, college or university, teacher's union, advocacy group, or other institutional client. Choose a lawyer carefully, give the relationship time to develop, and don't wait until the summons arrives to do it. Be less immediately concerned with actions and positions, and more deliberately concerned with basic purposes and objectives. Understand, when the lawyer probes motives, bares secrets, and exposes weaknesses, that it is far better to suffer such indignities at the hands of one's own lawyer in the privacy of the office than at the hands of someone else's lawyer in the public glare of the witness stand. Recognize that the closer lawyer and client can come to grips with basic purposes, the more numerous the planning options will be, and the more likely a legally defensible and cost-effective plan of action will emerge. And realize the truth of the familiar oil filter commercial on TV: "You can pay us now, or you can pay us later."

And what of our professors, who, in the school law classrooms, teach us *how* to be lawyers and *how* to be teachers, counselors, and educational administrators? Both in law schools and in graduate education programs, there is often overwhelming emphasis on the case method for teaching school law—the reading and interpretation of appellate judicial opinions. This is, of course, an important element of any school law course. But any given appellate opinion represents only the tip of a large iceberg of effort by lawyers and clients. Far more cases are tried at the district court level than are appealed, and far more still are filed than are tried, and one would certainly infer that even more never find their way out of a lawyer's office. Lawyers and clients spend far more of their working moments interacting with one another than they do litigating disputes. Yet very little in the typical school law course addresses how people go about *being* clients or *being* lawyers, what their expectations of each other should be, and how they should go about communicating with one another. Lawyers often find, in dealing with school administrators, that they are at the intersection of two different universes. Whether plaintiff or defendant, lawyers and educators have inherently different ways of thinking about cases, which can have disasterous implications in the law office, or worse yet on the witness stand as the lawyer on one track warily asks questions and the client or witness educator on another track warily ventures answers. Perhaps the school law curriculum can be the place where each learns more about the way the other thinks and operates.

Perhaps, also, there is room for original research on the forms preventive legal analysis might take in particular school law problem areas. How does one design the girl's athletic program so as to

accomplish the educational goals and yet minimize the risks of being found in noncompliance with Title IX? Very little of our scholarly legal literature is being written from an overtly preventive point of view.

Preventive law may be a subject, in which NOLPE could take advantage of the many disciplines and interests found among its membership by bringing many points of view to bear on issues of common concern.